FILE COPY

(File No. 36153)

FILED
FEB 11
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 339.

SOUTHERN PACIFIC COMPANY, *Petitioner,*

vs.

THE UNITED STATES.

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

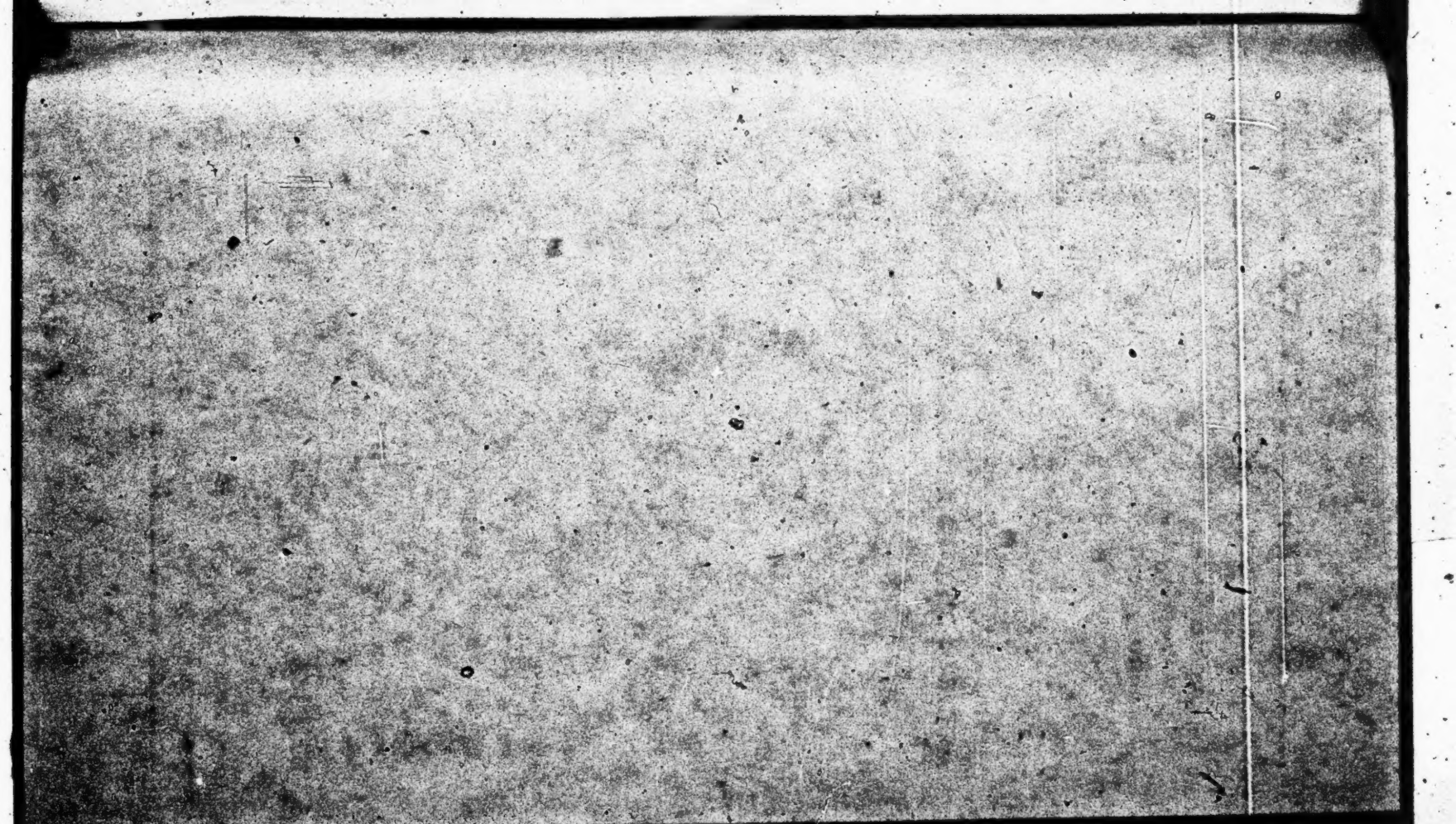
BRIEF FOR THE SOUTHERN PACIFIC COMPANY

(On the Merits)

CHARLES H. BATES,
Counsel for Petitioner,
Mills Building,
Washington, D. C.

February, 1932.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX.

	Page
Report of the Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement of Case	3
The Statutes Involved, and the Different Classes of Land-Grant Railroads	4
Argument	14
I. The term "troops," as used in the Railroad Land-Grant Acts, had an established meaning, namely, "soldiers collectively, a body of soldiers," at the time of enactment thereof	14
II. The whole history of all the legislation, under which aid was given by the United States to the land-grant railroads, shows that the term "troops", referred to therein, meant those persons who were either engaged at the time, or who might in the future be engaged, in the ACTUAL MILITARY DEFENSE of the Nation, or of its frontiers	18
III. Military service, and not military connection or employment with the Army, or the military establishment, is necessary to constitute a person one of the "troops of the United States"	22

Page

IV. Engineer officers of the War Department in performing duties IN TIME OF PEACE in connection with rivers and harbors improvements and the meetings of the California Debris Commission are NOT engaged in military activities, but are engaged in non-military activities 24

V. If there is any doubt or ambiguity in the language of the Land-Grant Acts with regard to the obligation to transport "troops of the United States" at reduced rates of charge, such doubt should be resolved against any broadening of the term, and its meaning should be limited to the ordinary and usual sense in which it was understood at the time of the enactment of the Statutes in which used..... 28

Conclusion 31

CASES CITED.

Alabama Great Southern R. R. Co. Case, 49 C. Cls. 522 23

Dunn v. The People, 94 Ill. 120..... 17

Lake Superior & Mississippi Railroad Co. v. United States, 93 U. S. 442 ("Highways" Case) 5

"Sinking Fund Cases," 99 U. S. 700..... 13-14

Slidell v. Grandjean, 111 U. S. 437..... 28, 30

~~Sioux City & St. Paul R. R. v. United States, 120 U. S. 896, 460 ..... 40~~

~~Stuart v. United States, 10 Wall. 84..... 30~~

Page

~~United States v. Central Pacific Railroad Company, 118 U. S. 235, 240 ..... 43~~
~~U. S. v. Galveston, Harrisburg & San Antonio Railway Co., 279 U. S. 401 ..... 42~~
~~Union Pacific Railroad Company v. U. S., 59 C. Cls. 226 ..... 39, 46, 49~~
United States v. Union Pacific R. R. Co., 249 U. S. 354 ..... 4, 15, 22, 31

STATUTES.

Act of March 30, 1822, 3 Stat. 659 (Land Grant Act) 15, 16
Act of March 2, 1833, 4 Stat. 662 (Land Grant Act) 15
Act of March 2, 1847, 9 Stat. 149 16
Act of March 3, 1847 [Resolution No. 7], 9 Stat. 206 16
Act of Sept. 20, 1850, 9 Stat. 466 (Land Grant Act) 4, 12, 15
Act of Sept. 28, 1850, 9 Stat. 504 (Army Appropriation Act) 16
Act of June 3, 1856, 11 Stat. 21 (Land Grant Act) 29
Act of July 1, 1862, 12 Stat. 489 (Pacific Railroad Act) 13, 14
Act of March 3, 1863, 12 Stat. 772 (Land Grant Act) 11
Act of July 2, 1864, 13 Stat. 356 (Pacific Railroad Act) 13, 14
Act of July 25, 1866, 14 Stat. 239 (Land Grant Act) 10
Act of July 27, 1866, 14 Stat. 292 (Land Grant Act) 6, 11, 12

Page

Act of May 7, 1878, 20 Stat. 56 (Thurman Act).. 13
Act of July 14, 1892, 29 Stat. 180 (Army Appropriation Act) 7
Act of June 3, 1916, 39 Stat. 166..... 8
Act of June 5, 1920, 41 Stat. 948, 959 (Army Appropriation Act) 7
Act of Feb. 13, 1925, Sec. 3 (b), 43 Stat. 936, 939 2
Act of May 23, 1928, 45 Stat. 722 (Land Grant Act) 11, 12
Act of Feb. 28, 1929, 45 Stat. 1349 24
Illinois, Act of January 16, 1836..... 19

OTHER CITATIONS.

American State Papers—Public Lands, Vol. VIII, p. 593 18
Army Regulations, 1913, Sec. 110 23
Army Regulations, 857, Sec. 1321..... 16
19 Atty. Gen. 572 ..... 29, 30
Congressional Globe, Vol. 28, p. 879..... 20

UNPUBLISHED DECISIONS.

Comptroller of the Treasury, April 9, 1910—Appeal No. 18613—Navy Sett. 1939, Feby. 26, 1910, S. P. Co..... 30
Comptroller of the Treasury, July 30, 1910—Appeal No. 19091—Navy Sett. 3723, June 27, 1910, S. P. Co..... 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 339.

SOUTHERN PACIFIC COMPANY, *Petitioner*,

vs.

THE UNITED STATES.

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE SOUTHERN PACIFIC COMPANY

(On the Merits)

REPORT OF THE OPINION BELOW.

The Opinion of the Court of Claims in this case (R. 72) has not yet been reported, but will probably later appear as 72 C. Cls. 273. The case was No. D-550 in the Court of Claims.

JURISDICTION.

The judgment of the Court of Claims was entered on June 1, 1931. (R. 82.) The petition for writ of certiorari was filed August 31, 1931. (R. 83.) The

petitioner invoked the jurisdiction of this Court under Section 3(b) of the Act of February 13, 1925 (Ch. 229, 43 Stat. 936, 939). A limited writ was granted November 30, 1931, as shown by the following extract from the Order of this Court:

> The petition herein for a writ of certiorari to the Court of Claims is granted, limited to the question raised with respect to Engineer Officers of the War Department in performing duties in time of peace in connection with rivers and harbors improvements and the meetings of the California Debris Commission. * * * (R. 85)

QUESTION PRESENTED.

In view of the limitation placed on the writ of certiorari the question of law involved in this case is only as to whether or not the United States is entitled to so-called "land-grant deductions"—as hereinafter explained—from charges for services performed over "land-grant railroads" in the transportation of *Engineer Officers of the War Department in performing duties in time of peace in connection with rivers and harbors improvements and the meetings of the California Debris Commission.*

Whether or not the United States is entitled to such deductions would depend on whether such persons were, at the time of their transportation, "*troops* of the United States" within a fair, reasonable and just meaning of the reservations and restrictions concerning the transportation of "troops and property of the United States" contained in the several Acts of Congress making grants of lands to certain railroads, and as enforced in the Army Appropriation Acts, and

other acts, under which the transportation in question was authorized.

If it be held that the United States is entitled to "land-grant deductions," when the transportation is over land-grant railroads, then your petitioner would have to acquiesce in deductions of like amounts, as for transportation over land-grant railroads, when the transportation is over non-land-grant railroads which have agreed that the cost thereon would not exceed the cost if the land-grant roads had been traversed, as may be the case in some of the instances involved herein.

Likewise, your petitioner, in such circumstances, would have to acquiesce in the certain so-called "percentage deductions" which were made, and constitute part of the amount claimed in this proceeding, account of certain Military Arrangements between the railroads and the Quartermaster General of the Army in force at the time of the transportation.

It will be necessary, therefore, to discuss herein the question only with regard to the "land-grant deductions."

STATEMENT OF THE CASE.

The transportation involved herein was performed during the years 1920 to 1923, inclusive, by Southern Pacific Company, by itself, or in participation with other carriers. For the most part the pertinent facts, as found by the Court below, are stated in Paragraph IX of its SPECIAL FINDINGS OF FACT, as follows:

IX.

4. Engineer Officers of the War Department on Duty in Connection with River and Harbor

Works and the California Débris Commission.—The persons listed in Exhibit B to the second amended petition under this heading were all officers of the Engineer Corps of the United States Army, the cost of whose transportation was paid from appropriations of the War Department covering river and harbor works and the California Débris Commission, and they were traveling for the purposes connected with river and harbor improvement work or to attend meetings of said commission. The land grant and percentage deductions on these items aggregate $456.77 and $4.36, respectively. (R. 70-71)

THE STATUTES INVOLVED, AND THE DIFFERENT CLASSES OF LAND-GRANT RAILROADS.

There are several classes of land-grant railroads. Four classes will be referred to herein:

The earliest railroad land-grant act—and which we shall therefore refer to as illustrating the *first class* of land-grant railroads—that has come to our attention is that of September 20, 1850 (9 Stat. 466), referred to in this Court's opinion March 31, 1919, in case of *United States vs. Union Pacific R. R. Co.* (249 U. S. 354, 357), under which the *Illinois Central Railroad* and the *Mobile and Ohio Railroad* were constructed. The title thereof and the provisions therein with respect to transportation for the United States are as follows:

> "CHAP. LXI—*An Act granting the Right of Way, and making a Grant of Land to the States of Illinois, Mississippi, and Alabama, in Aid of the Construction of a Railroad from Chicago to Mobile.*
>
> * * * * * * * *

"SEC. 4. *And be it further enacted,* That the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other; and the *said railroad and branches shall be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any* PROPERTY OR TROOPS OF THE UNITED STATES. (Italics and capitals ours.)

* * * * * * * 6

"SEC. 6. *And be it further enacted,* That the United States mail shall at all times be transported on the said railroad under the direction of the Post-Office department, at such price as the Congress may by law direct."

Other railroads later were constructed under grants of land carrying like provisions.

None of these railroads received aid in Government bonds.

Under the decision of this Court in *Lake Superior & Mississippi Railroad Co. v. United States,* 93 U. S. 442 (Oct. Term, 1876), these provisions were construed as giving to the United States *free* use of the roadbed as a highway, only, and thereafter companies operating railroads constructed under such provisions were permitted to charge for the use of the rolling stock and for motive power in the transportation of property and troops of the United States at rates equal to fifty percentum of those charged private parties.

What we shall refer to as the *second class* of land-grant railroads are those constructed under Acts containing provisions like those under which the *Atlantic and Pacific Railroad* (*now owned by the At-*

chison, Topeka, and Santa Fe Railway Company), from Isleta, N. M., to Needles, Calif., and the *Southern Pacific Railroad of California*, from Mojave, Calif., to Needles, Calif., (*now owned by the A. T. & S. F. Ry. Co.*); and also the *Southern Pacific Railroad of California*, from Mojave, Calif., via Los Angeles, to Colorado River, opposite Yuma, Ariz., were land aided. The Act referred to was approved July 27, 1866 (14 Stat. 292). The title thereof and the provisions relating to transportation for the United States were as follows:

"CHAP. CCLXXVIII.—*An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast,*

* * * * * * * *

"SEC. 5. *And be it further enacted,* That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, * * * *Provided, That the said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service.* (Italics ours.)

* * * * * * * *

"SEC. 11. *And be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, *shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.* Italics ours.)

* * * * * * * *

"SEC. 18. *And be it further enacted,* That the Southern Pacific Railroad, a company incorporated under the laws of the State of Califor-

nia, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

None of these railroads received aid in Government bonds.

A noticeable feature of this class of land-grant railroads is that the Company is expressly permitted to charge the United States *full rates* for transportation and telegraphic service, not to exceed rates paid by private parties, except *only* when Congress may restrict such charges. Restriction has since been imposed, in the Army Appropriation Acts, but *only with respect to transportation of "troops and munitions of war and military supplies and property."* (See Act of July 14, 1892, 29 Stat. 180, and the Army Appropriations Acts from then to the present time.)

In connection with *classes one and two* of land-grant railroads, as herein described, certain pertinent parts from the Army Appropriation Act for the fiscal year ending June 30, 1921, approved June 5, 1920, (41 Stat. 948, 959) are here quoted:

"TRANSPORTATION OF THE ARMY AND ITS SUPPLIES.

"For transportation of the Army and its supplies, including transportation of the TROOPS when moving either by land or water, and of their baggage, including the warrant officers of the Mine Planter Service, members of the officers' reserve corps, enlisted men of the enlisted reserve corps, and retired enlisted men when ordered to active duty, including the cost of packing and crating; for transportation of recruits and recruiting parties, of applicants for enlistment between recruiting stations and recruiting depots; for travel allowance to officers and enlisted men on discharge; for payment of travel allowance as provided in section 126 of the Act approved June 3, 1916, to enlisted men of the National Guard on their discharge from the service of the United States, and to members of the National Guard who have been mustered into the service of the United States, and discharged on account of physical disability; for payment of travel pay to officers of the National Guard on their discharge from the service of the United States, as prescribed in the Act approved March 2, 1901; * * * *for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts)*[1] (Italics ours), but in no case shall more than 50 per centum of full amount of service be paid; * * * *Provided,* That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large, and shall be accepted as in full for all demands for such service: *Provided further,* That in ex-

[1] These are the *class one* land-grant railroads as described herein.

pending the money appropriated by this Act *a railroad company which has not received aid in bonds of the United States and which obtained a grant of public land to aid in the construction of its railroad on conditions that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval, and other Government services, and also subject to such regulations as Congress may impose restricting the charge for such Government transportation,*[2] (Italics ours) having claims against the United States for *transportation of troops and munitions of war and military supplies and property over such aided railroads,* (Italics ours) shall be paid out of the moneys appropriated by the foregoing provisions only on the basis of such rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed 50 per centum of the compensation of such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service: *Provided further,* That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts: * * *

What we shall refer to as the *third class* of land-grant railroads is illustrated by the *Southern Pacific*

[2] These are the *class two* land-grant railroads as described herein.

Company's line from Roseville Junction, Calif., to East Portland, Ore. This road received its grant of lands under Act of July 25, 1866 (14 Stat. 239). The title thereof and the pertinent provisions relating to Government transportation are as follows:

> "CHAP. CCXLII.—*An Act granting Lands in aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon.*
>
> • • • • • • • •
>
> "SEC. 5. *And be it further enacted,* That the grants aforesaid are made upon the condition that the said companies shall keep said railroads and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that *the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service.* (Italics ours.) And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the *property or troops of the United States;* (Italics ours) and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States."

It will be observed that this is another class of land-grant railroads which was expressly permitted to charge *full rates* for railroad and telegraph ser-

vice performed for the United States, not to exceed rates paid by private parties, except that it was to transport *free* the "property or troops of the United States." This requirement for *free* transportation of *property or troops of the United States* continued for the period of time down to May 23, 1928, on which day the President approved an Act to the effect that it should be a *"50 per cent railroad,"* as follows (45 Stat. 722):

> "CHAP. 720.—*An Act For the relief of the land-grant railroad operated between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California.*
>
> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the land-grant railroad heretofore operated, and now being operated between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided,* That the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such Government transportation."

The land-grant act of March 3, 1863 (12 Stat. 772), therein referred to, was in aid of the Atchison, Topeka and Santa Fe Railway Company's line from Lawrence, Kans., to Humboldt, Kans., and was similar in all essential parts, so far as it relates to Gov-

ernment transportation, to the Act of September 20, 1850 (9 Stat. 466), above, under which the Illinois Central Railroad and the Mobile and Ohio Railroad were aided. The Act of July 27, 1866 (14 Stat. 292), referred to, is the one under which grants of land were made to aid in the construction of the Atlantic and Pacific Railroad (now owned by the Atchison, Topeka and Santa Fe Ry. Co.) from Isleta, N. M., to Needles, Calif.; and the Southern Pacific Railroad of California, from Mojave, Calif., to Needles, Calif. (now owned by the Atchison, Topeka and Santa Fe Ry. Co.); and also, the Southern Pacific Railroad of California, from Mojave, Calif., via Los Angeles to Colorado River, opposite Yuma, Ariz.

It will, therefore, be seen that, under this Act of May 23, 1928, the Congress directed that the Company operating the said railroad should thereafter be paid *50 per centum* of full charges for transportation of *property and troops of the United States,* instead of having to transport same *free.*

This Act is here presented as one of the evidences that *Congress has not sought to increase the burdens of these land-grant provisions, but rather has sought to relieve railroads from the harsh burdens thereof in part at least.*

There is a *fourth class* of land-grant railroads which may be referred to, namely, those which also received *aid in bonds,* from the United States, more commonly referred to as *bond-aided railroads,* or *Pacific Railroads.* This class is illustrated by the *Union Pacific Railroad* and the *Central Pacific Railroad* (the latter now operated by *Southern Pacific Company*). These roads extend from Omaha, Nebr., to San Francisco Bay, Calif. They were constructed

under the Act of July 1, 1862 (12 Stat. 489) as amended by the Act of July 2, 1864 (13 Stat. 356). The title of the Act of July 1, 1862, and its provisions, so far as they relate to transportation for the United States, read as follows:

> "CHAP. CXX.—*An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River, to the Pacific Ocean, and to secure to the Government the Use of the same for Postal, Military, and Other Purposes.*
>
> * * * * * * *
>
> "SEC. 6. *And be it further enacted,* That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and *shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government* (italics ours), whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (*at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service*); (italics ours), and all compensation, for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. * * *"

(Note: The provision with regard to "all compensation for services rendered for the government" being applied to payment of the bonds, issued to aid these railroads, was changed by the Act of July 2, 1864, so that only *one-half* of such compensation was retained for such purpose.

Later by the Act of May 7, 1878, 20 Stat. 56 (Thurman Act), the remaining one-half of such compensation was to be placed in a Government managed Sinking Fund to be used as a guaranty of final payment of the indebtedness that would become due at maturity of the bonds issued to these companies by the United States. In the "Sinking Fund Cases,"

99 U. S. 700, it was expressly held that the earnings so placed in the Sinking Fund remained the property of the companies, and that the contracts of all the parties under the Act of July 1, 1862, as amended by the Act of July 2, 1864, remained unimpaired.

These references are here made as further evidence that Congress has not sought to increase the burdens of railroads to which it gave aid in their construction.)

These so-called "Pacific Railroads" were not required to suffer any deduction from the amounts of their charges, and it will be observed that they, like the prior two *classes* of land-grant roads described herein, were expressly permitted to charge *full rates* for transportation for the United States the same as private parties.

It is believed that the transportation, out of which the claims herein arose, was all performed over portions of the land-grant Southern Pacific Railroad of California (now part of Southern Pacific Company), a *class two* land-grant railroad as described herein, and over portions of Southern Pacific Company's line from Roseville Junction, Calif., to East Portland, Ore., a *class three* land-grant railroad as described herein.

ARGUMENT.

I.

The term "troops," as used in the Railroad Land-Grant Acts, had an established meaning, namely, "soldiers collectively, a body of soldiers," at the time of enactment thereof.

The expression "troops of the United States" was undoubtedly used in the land-grant acts in its usual and ordinary sense, as signifying "soldiers collectively a—body of soldiers." It might be sufficient in this connection, to cite only this Court's holding in

the case of *United States vs. Union Pacific Railroad Co.*, 249 U. S. 354, where it was stated,

> "In 1850 the word 'troops' had (and it has ever since had) an established meaning:—namely, 'soldiers collectively,—a body of soldiers.'"

This conclusion was reached in the following statement in said decision (pp. 356-358):

> "In defining the transportation rights secured to the United States, these land-grant acts draw a broad distinction between freight and passengers. All 'property' of the Government, whatever its character and intended use, is to be carried 'free of toll or other charge'; but of the many persons in its service, only 'troops'. The history of the legislation shows that both the broad term, 'any property', and the narrower one, 'troops', was adopted deliberately. The earliest land-grant act in which the provision appears is that of September 20, 1850, c. 61, sec. 4, 9 Stat. 466, 467, under which the Illinois Central was constructed. The bill as introduced provided for the free transportation of 'troops and munitions of war'. It was amended so as to read 'any property or troops.' There had been an earlier act granting land to the State of Illinois for the construction of a canal (Act of March 30, 1822, c. 14, 3 Stat. 659) which was amended (Act of March 2, 1833, c. 87, 4 Stat. 662) so as to permit, on the same terms, the use and disposition of the land for railroads. That act provided for the free transportation of 'any property of the United States, or persons in their service.'
>
> *"In 1850 the word 'troops' had (and it has ever since had) an established meaning:—namely, 'soldiers collectively,—a body of soldiers.'*

(Italics ours.) Thus the Army Appropriation Act of that year (Act of September 28, 1850, c. 78, sec. 1, 9 Stat. 504, 506) provides for the 'transportation of the army, including the baggage of the troops when moving either by land or water' and for 'mileage, or the allowance made to officers for the transportation of themselves and baggage when travelling on duty without troops.' The contemporary legislation draws a clear distinction also between troops, that is, *those then having the status of soldiers* (Italics ours), and those who once had been in, or were seeking to enter, the military service. Thus the Army Appropriation Act of March 2, 1847, c. 35, 9 Stat. 149, 151 (which provides in substantially the same terms as that of 1850 for the transportation of troops) makes specific provision for 'forwarding destitute soldiers to their homes', for the 'comfort of discharged soldiers', and for 'expenses of recruiting', which include the cost of transportation. See Army Regulations, 1857, sec. 1321. And the Resolution of March 3, 1847, [No. 7], 9 Stat. 206, authorizes the refund of moneys expended by the States and individuals 'in organizing, subsisting and transporting volunteers previous to their being mustered and received into the service of the United States for the present war, and for subsisting troops in the service of the United States.' In view of the established meaning of the term 'troops' as used by Congress the duty of the court is merely to apply the provisions of the act to the several classes of persons described above."

The title of the Act of March 30, 1822 (C. 14, 3 Stat. 659) referred to in the above quotation, and the pertinent provision thereof, read as follows:

"CHAP. XIV.—*An Act to authorize the state of Illinois to open a canal through the public lands, to connect the Illinois river with Lake Michigan.*

* * * * * * *

"* * * * *Provided also, and it is hereby further enacted and declared,* That the said canal, when completed, shall be, and for ever *remain, a public highway for the use of the government of the United States, free from any toll or other charge whatever, for any property of the United States, or persons in their service,* [Italics ours] passing through the same."

As stated in this Court's opinion, quoted above, this appears to be the first land-grant legislation in aid of any kind of transportation (canal) in the United States, and by its terms, if it had been applied to railroads, would have permitted free use of the highway for *all persons* in the service of the United States. But such a broad requirement never appeared in any railroad legislation. The term was thereafter narrowed down to "troops." And so it was continued through all the years, without any attempt to enlarge the term, or to define it in any manner other than that the persons should be "*troops* of the United States."

In *Dunn v. The People,* 94 Ill. 120, the Supreme Court of Illinois, referring to the word "troops" as used in the provision of the Federal Constitution (Art. I, sec. 10) that "No State shall, without the consent of Congress, * * * keep troops or ships of war in time of peace", said:

> "The word 'troops' conveys to the mind the idea of an armed body of soldiers whose sole occupation is war or service, answering to the regular army."

All the standard dictionaries define the term "troops" in substantially the same way: *i. e.*, as a body of soldiers.

II.

The whole history of all the legislation, under which aid was given by the United States to the land-grant railroads, shows that the term "troops", referred to therein, meant those persons who were either engaged at the time, or who might in the future be engaged, in the ACTUAL MILITARY DEFENSE of the Nation, or of its frontiers.

Some of the incidents going to make up the *history of the times* are here submitted so as to show that what was contemplated in the land-grant legislation was that only *bodies of soldiers in actual defense of the nation and its frontiers* were considered as *troops* back in the days when it was enacted, as indeed also in the present days.

Thus, in "American State Papers—Public Lands" (Vol. VIII, P. 593) will be found an early discussion of the proposed grant of lands to the Illinois Central Railroad Company, from which we quote the following:

> "24th Congress. No. 1498. 1st Session.
>
> "IN FAVOR OF A GRANT OF LAND TO AID IN THE CONSTRUCTION OF THE ILLINOIS CENTRAL RAILROAD.
>
> "Communicated to the House of Representatives, March 31, 1836. Mr. Casey, from the Committee on the Public Lands, to whom was referred the memorial of the Illinois Central Railroad Company, reported:

"That by an act of the legislature of the State of Illinois, approved on the 16th January, 1836, a company was incorporated, and authorized, and empowered, to locate, construct, and finally complete a railroad, commencing at or near the mouth of the Ohio river, in the State of Illinois, thence north to a point on the Illinois river, at or near the termination of the proposed Illinois and Michigan canal, with the right to extend the same to the town of Galena in the said State.

* * * * * * * * *

"When the Mississippi and Ohio are fast bound up in ice, *troops and munitions of war can be transferred with a rapidity and despatch unknown to water transportation,* to the frontiers of Illinois, Wisconsin, and Northern Missouri, whence they can be *stretched along the lines of these frontiers in an incalculably short period of time.*

* * * * * * * * *

"Considered then as a facility of carrying out a system about undergoing the action of Congress for the transportation of the United States mail, it should be regarded in a most favorable light. It is also in contemplation, (and recent experience proves that it is only necessary to conceive a work of internal improvment, to carry it into effect,) to extend the road from the mouth of the Ohio to Nashville, in the State of Tennessee, to meet the projected road from that city to New Orleans, and to unite with branches of the great Charleston project, and the contemplated Baltimore and Ohio, and Richmond railroads.

"The completion of these great works would identify the interests of the whole valley of the Mississippi, and bring the west and the south into the most intimate communion. Viewing this subject in every possible point of light, as cre-

ating at its southern termination, a commercial emporium of great future consequence to the commerce of the western States, at which will concentrate the trade from the sources of the Mississippi and Missouri, the mineral regions of the north and southern Missouri, the manufactures of the Ohio and tributaries, the rich products of the southern country, brought in exchange for the superabundant productions of the rich soils of Illinois, *or as giving value to millions of acres of the public domain, which are now wholly worthless and unsaleable*; or as enhancing the revenues of the State, and contributing to its welfare and prosperity, in the increase of its population, wealth, and intelligence, and in direct and positive benefits to the people, or as *creating great facilities in the conveyance of the mail, the* TRANSPORTATION OF TROOPS AND MUNITIONS OF WAR *from one extreme of the country to another, at all seasons of the year, in one-fourth of the time, and at one-half the expense now required,* or its effects upon the social and political relations of a large portion of the American people, or their public, or their private interests; it operates upon each and all in the most beneficial manner."

Then, on April 10, 1854, Senator Guin, of California, speaking in the United States Senate upon the proposed Pacific Railroad, among other things said, —capitalization ours—(Cong. Globe, Vol. 28, p. 879):

"As a *military road,* it should engage our attention as a means of protection to our citizens between the Mississippi and the Pacific.

* * * * * * * * * *

"The contemplated railway would enable the Government to wield its military power with ex-

traordinary rapidity and economy, and keep in check the dangerous and warlike tribes that roam along the foot of the Rocky Mountains; would reduce the public expenditures for the transportation of TROOPS and military supplies * * *"*

Referring to the purposes for which the Constitution was framed, as stated in its preamble, Senator Guin further said (*id.*):

"The measure before us is one emphatically required at your hands by those significant terms. By accomplishing it, foreign fleets and armies will in vain assail us upon the Pacific or Atlantic. From ocean to ocean this new means of communication will carry our TROOPS and munitions of war, and enable us, by rapidity of overland communications to use the *military power with such celerity as to defy successful invasion from any quarter.* The Commander-in-Chief at Washington could issue his orders and *move his armies* with as much dispatch, from this to the other side of the Continent, as did the great Emperor in the field of his extensive operations during the wars of the First French Revolution * * * In case of war how are you without it to defend California and New Orleans? Where is your Navy by which to accomplish such a purpose? Where are your transports, or how would they reach their destination? How would you carry TROOPS, munitions or supplies over the mountains, and desert that separates the Pacific from the Mississippi?"

III.

Military service, and not military connection or employment with the Army, or the military establishment, is necessary to constitute a person one of the "troops of the United States."

In the *Union Pacific Case* (249 U. S. 354)—so frequently referred to because it was so comprehensive of the principles governing transportation for the United States—the **purpose** of transportation of persons connected with the Army, as individuals, or as groups of individuals, was stated with relation to the several classes of persons therein considered and held *not* to constitute such persons "troops of the United States" within the meaning of the Land-Grant Acts, namely, *Discharged Soldiers; Dicharged Military Prisoners; Rejected Applicants for Enlistment; Accepted Applicants for Enlistment; Retired Soldiers en route to their homes after retirement; and Furloughed Soldiers, that is, enlisted men of the Army on furlough en route back to their proper stations,* even though all these persons were transported, in the first instance at least, at the expense of the United States. This Court said (pp. 356 and 360):

> "None of these persons travelled as part of a moving army, troop, or body of soldiers. That is, they travelled separately as individuals, and (with few exceptions) each on a different day and to widely scattered destinations. Under recent Acts of Congress and Army Regulations, the transportation of persons of some of these classes is paid for by the Government.
>
> * * * * * * * * *
>
> "*Third.* Retired enlisted men en route to their homes after retirement are also not 'troops of

the United States.' They travel for their own purposes. Congress has declared that such retired men shall for certain purposes be deemed a part of the Army * * *; but they may be employed only after Congress has authorized the raising of volunteer forces; and not even then for field duty. * * * The fact that they may thereafter be called into the Army does not make them 'troops of the United States.' Any male citizen may at some time be called into the service. Compare *Alabama Great Southern R. R. Co. v. United States, supra.*"

Fourth. The furloughed soldier is, of course, a part of the Army or troops of the United States; (italics ours) but his transportation back to the proper station, is not "transportation of troops" within the meaning of the land-grant acts. The furloughed soldier travels for his own purposes. The Government merely advances to him the cost of transportation and subsistence while on furlough; and does this, only if the soldier lacks funds to bear the expense himself. The advance must be repaid. Army Regulations, 1913, sec. 110."

It is made clear therein that even though a person transported is actually a *soldier,* and one of the "troops of the United States,"—such as a *retired* soldier, or a *furloughed* soldier,—yet he may *not* be *one of the "troops of the United States," within the purposes of the Land-Grant Acts.*

IV.

Engineer officers of the War Department in performing duties IN TIME OF PEACE in connection with rivers and harbors improvements and the meetings of the California Debris Commission are NOT engaged in military activities, but are engaged in non-military activities.

Congress itself has expressly declared that the activities in which Engineer Officers of the War Department are engaged in rivers and harbors work and in attendance upon meetings of the California Debris Commission are NON-MILITARY, and it would seem to require no argument to establish this point other than to cite the statutes under which Engineer Officers of the War Department perform their duties in connection with such work. We therefore submit that these *duties are merely civil in their nature* as is shown by the various Army Appropriation Acts. We quote particularly the pertinent parts from the Army Appropriation Act for 1930, approved February 28, 1929, as follows:

(45 Stat. 1349, 1374, 1379, 1388)

(Page 1349)

An Act Making appropriations for the military and nonmilitary activities of the War Department for the fiscal year ending June 30, 1930, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the military and nonmilitary activities of the War Department for

the fiscal year ending June 30, 1930, and for other purposes, namely:

TITLE I—MILITARY ACTIVITIES AND OTHER EXPENSES OF THE WAR DEPARTMENT INCIDENT THERETO.

* * * * * * * *

(Page 1374)

TITLE II—NONMILITARY ACTIVITIES OF THE WAR DEPARTMENT.

* * * * * * * *

(Page 1379)

CORPS OF ENGINEERS.

* * * * * * * *

CALIFORNIA DEBRIS COMMISSION.

For defraying the expenses of the commission in carrying on the work authorized by the Act approved March 1, 1893 (U. S. C., p. 1086, sec. 661), $15,340.

* * * * * * * *

(Page 1379)

RIVERS AND HARBORS.

To be immediately available and to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers:

For the preservation and maintenance of existing river and harbor works, and for the prosecution of such projects heretofore authorized as may be most desirable in the interests of commerce and navigation; for survey of northern and northwestern lakes, Lake of the Woods, and other boundary and connecting waters between the said lake and Lake Superior, Lake Champlain, and the natural navigable waters embraced in the

navigation system of the New York canals, including all necessary expenses for preparing, correcting, extending, printing, binding, and issuing charts and bulletins and of investigating lake levels with a view to their regulation; (page 1380) for examinations, surveys, and contingencies of rivers and harbors, provided that no funds shall be expended for any preliminary examination, survey, project, or estimate not authorized by law; and for the prevention of obstructive and injurious deposits within the harbor and adjacent waters of New York City, for pay of inspectors, deputy inspectors, crews, and office force, and for maintenance of patrol fleet and expenses of office, $50,000,000.

For bank protection for the control of floods and the prevention of erosion of the Missouri River at and near the town of Niobrara in the State of Nebraska, $85,000, said work to be carried on under the control and supervision of the Chief of Engineers of the War Department: *Provided,* That the local interests shall contribute two-thirds of the cost of said work.

For bank protection for the control of floods and the prevention of erosion of the Missouri River at and near the town of Yankton in the State of South Dakota, $85,000, said work to be carried on under the control and supervision of the Chief of Engineers of the War Department: *Provided,* That the local interests shall contribute two-thirds of the cost of said work.

That as a contribution in aid from the United States, in view of the unprecedented conditions obtaining in Conway levee district numbered 1, Conway County, Arkansas, in the reconstruction of the levee along the left bank of the Arkansas River in the said Conway levee district numbered 1, as provided under the terms of section 7 of the Flood Control Act, approved May 15, 1928 (45 Stat., p. 537), authority is herby granted to

the Secretary of War, upon the recommendation and approval of the Chief of Engineers, to relocate all or any part of said levee when in the opinion of the Chief of Engineers such relocation shall be deemed practical and feasible: *Provided*, That the total expense occasioned to the United States by reason of the provisions of this paragraph shall not exceed $20,000."

An examination of the provisions quoted above shows the purely civil nature of all the services authorized by Congress in connection with both the rivers and harbors work and the California Debris Commission.

(See also various Annual Reports of the Secretary of War, among others that for 1928, P. 25, *et seq.*, which lists the civil activities of the Corps of Engineers, among others being rivers and harbors work and California Debris Commission; and Annual Report for 1930, P. 9.)

It would, indeed, require a long stretch of the imagination to reach the conclusion that these activities, in the mere keeping open of rivers and harbors for purposes of commerce, are in any sense a military activity, or fulfill a military purpose. If there be any military purpose in this class of work, then we might also say that if Army Engineers were to be detailed to the construction of buildings for the Department of Commerce, they would be engaged in a military duty. And so on with regard to other works that we might conceive that at some time Army Officers might be delegated to perform in times of peace, and, in fact, there is probably nothing in the way of engineering work in the country—highway building, railroad construction, etc.,—that might not in a final analysis

be considered as embracing *an element of military concern.* But surely it is not work that merely embraces "an element of military concern" or that "partakes of a military nature" that is to control in determining a *military duty,* and especially such a military duty as must have been in the minds of the legislators when the privilege was granted by these land-grant railroads to reduced rate transportation for "troops of the United States" back sixty or eighty years ago when the sole thought with regard to such persons was that they might defend our nation against foreign foes *in time of war,* or against *hostile outbreaks of Indians* on our Frontiers.

V.

If there is any doubt or ambiguity in the language of the Land-Grant Acts with regard to the obligation to transport "troops of the United States" at reduced rates of charge, such doubt should be resolved against any broadening of the term, and its meaning should be limited to the ordinary and usual sense in which it was understood at the time of the enactment of the Statutes in which used.

Unfortunately some persons, who have been called upon in years gone by to apply the Land-Grant Acts to transportation for the United States, have been prone to become confused in the rules of interpretation applicable. They had heard of the rule of construction stated by this court in *Slidell v. Grandejean,* 111 U. S. 437, in the following:

> "It is also a familiar rule of construction that where a statute operates as a grant of public

> property to an individual, or the relinquishment of a public interest; and there is a doubt as to the meaning of its terms or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often said that such acts are usually drawn by interested parties, and they are presumed to claim all they are entitled to."

Such persons considered that case as having application to the question of the right of the Government to land-grant reductions. However, the principle thus announced by this Court, as above, is applicable, in terms, only to "a grant of public property to an individual, or the relinquishment of a public interest." Of course, such a rule of construction has no application to a railroad land-grant act by which *a privilege is extended by a grantee railroad for the benefit of the United States.*

We would refer here to the Attorney General's opinion of June 9, 1890, 19 Opin. A. G. 572, as indicating a wrong application of this rule of construction to the very question here considered, of the right of the United States to "land-grant deductions" in the transportation of Officers of the Engineer Corps of the Army while traveling in the discharge of duties connected with rivers and harbors improvements, under provisions of the Michigan Central Railroad land-grant Act of June 3, 1856, 11 Stat. 21, as amended June 3, 1866, requiring the use of its highway in the transportation of "troops of the United States" free from toll or other charge. An examination of that opinion shows that the Attorney General was laboring under the same misapprehension, as mentioned

above, as to the nature of such a condition in the land-grant Act, for he based his reasoning upon the very principle, quoted above, laid down in the case of *Slidell vs. Grandejean* (*supra*), clearly indicating that he had confused a *privilege* extended by a grantee railroad *to* the United States, on the one hand, with a grant of "public property to an individual, or the relinquishment of a public interest," *by* the United States, on the other.

Certainly, such a *privilege* is not to be enlarged by doubtful construction, especially where, as here, such enlargement would place an unnecessary and ever-increasing burden upon the grantee. Rules of interpretation are to be invoked *only where there is doubt or ambiguity.* We respectfully submit that there is no doubt or ambiguity when one looks at the situation broadly, and reads the history of the land-grant railroads, and the decisions of this Court and the opinions of other courts, with the attention merited by the questions involved.

The application of the principle of construction, cited in 19 Opin. O. G. 572 (*supra*), was fruitful of common error on the part of accounting officers of the Government, who, in consequence, made rulings, for instance, that a municipal *policeman*, being transported with a deserter in his charge, was one of the "troops of the United States", within the meaning of the land-grant acts; that a *widow* accompanying the remains of her deceased husband, a Navy Yeoman, was one of the "troops of the United States" (unpublished decision of the Comptroller of the Treasury, April 9, 1910, Appeal No. 18613—Navy Settlement No. 1939, dated February 26, 1910); also that a *woman teacher* at Naval Station, Guam, was a "special laborer" attached to the Naval establishment as

a civilian employee of the Navy, and, therefore, was one of the "troops of the United States" within the *mystical* meaning of the land-grant acts (unpublished decision of the Comptroller of the Treasury, July 30, 1910, Appeal 19091—Navy Settlement No. 3723, dated June 27, 1910); etc., etc.

These erroneous rulings would certainly have very vastly multiplied had it not been for the decision of this Court in the *Union Pacific Case,* 249 U. S. 354; AND WE FEEL WILL AGAIN ARISE AND MULTIPLY IN MANY NEW FORMS IF THE DECISION NOW UNDER CONSIDERATION BE NOT REVERSED.

CONCLUSION.

It is respectfully submitted: (1) that, in view of the history and the wording of the land-grant acts, in order for a person to be one of the "*troops* of the United States," within the meaning of such Acts, he must be, at the time of his transportation, actually engaged in a *military duty,* such as is ordinarily recognized as such; (2) that Congress has expressly declared that when Engineer Officers of the War Department are performing duties in time of peace in connection with rivers and harbors improvements and meetings of the California Debris Commission, they are performing *non-military duties;* (3) that official listings by the War Department of the classes of duties of Army officers, when so engaged, show that they were performing *non-military duties;* and, (4) even if there were not such high authority to evidence that these Army officers were *not* engaged on military duties, we must still consider that they were *not* so

engaged because, by every reasonable test, the duties on which they were engaged were purely *civil duties* and were *such as any trained civil engineer might well perform;* and, further, (5) there is nothing in the decisions of the courts or military authorities, to warrant the belief that the term "troops of the United States," as used in the land-grant acts, ever was intended to include any person not actually engaged as a *soldier,* as that term is commonly understood and was understood sixty or eighty years ago when the land-grant legislation was enacted.

It is further respectfully submitted that the deductions claimed herein were improperly made.

We respectfully ask that the lower Court may be reversed.

Respectfully submitted,

CHARLES H. BATES,

Counsel for Southern Pacific Company, Petitioner.

February, 1932.